ABDUL MANAF MOHD BIN GHOWS & 13 ORS.

v.

NUSANTARA TIMUR SDN. BHD. & 2 ORS.

HIGH COURT, KUALA LUMPUR
DATO' ANUAR BIN DATO' ZAINAL ABIDIN J.
[CIVIL SUIT NO. S6-22-112-1990]
20 APRIL 1993

PRACTICE & PROCEDURE: Application to extend time to apply for further argument - O. 56 r. 2(2) Rules of the High Court 1980 - Discretion of Court - Order 3 r. 5(1) RHC 1980 - Principles on which discretion to be exercised - Merits of the application - Delay in making application - Whether reasons for the delay acceptable.

The plaintiffs appeal to the Judge in Chambers against the decision of the Senior Assistant Registrar dismissing the Order 14 application was allowed. The second and third defendants failed to apply for further argument in open Court within the time limits specified and after a lapse of more than two months applied for an extension of time to make the application for further argument. The plaintiffs were not present at the hearing of the defendants application which was granted. The plaintiffs applied for further argument in open Court.

Counsel for the plaintiffs contended that as the second and third defendants had only made the application to extend time after a delay of over two months, in the circumstances of the case the Court should not exercise its discretion to extend time.

Counsel for the second and third defendants contended that under O. 3 r. 5(1) RHC 1980 the Court has express jurisdiction to extend time and that under O. 92 r. 4 it has inherent jurisdiction to do so to prevent injustice. Counsel further contended that the plaintiffs had failed to show that the Court had exercised its discretion on wrong principles.

Held:

[1] Rule 5(1) RHC 1980 confers on the Court a wide discretion in either extending time or abridging time to do any act required or authorized by the RHC. This discretion should be exercised judiciously based on the facts of each particular case, having regard to a number of material factors such as the reasons for the delay, the length of the delay, the merits of the claim or the defence as the case may be and the degree of prejudice to the other party.

[2] The defendants had sufficiently explained the reasons for the delay and taking into account the defence of the defendants, there was sufficient materials to show that the defendants should not be deprived of the opportunity for further argument in the circumstances of the case.

[3] The plaintiffs would not be prejudiced by the extension of time as they would in any event have a full opportunity to prove their claim at the trial even if they fail to obtain summary judgment. In the circumstances the defendants should be allowed an extension of time to make an application for further argument in open Court in the interests of justice.

[Order granting defendants extension of time confirmed].

Cases referred to:

Palata Investments Ltd. v. Burt & Sinfield Ltd. [1985] 2 All ER 517 ***(refd)***

Sinnathamby v. Lee Chooi Ying [1987] CLJ 157 / [1987] 1 MLJ 110 ***(foll)***

Pearson v. Chen Chien Wen Edwin [1991] 3 MLJ 208 ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 3, r. 5(1), O. 14, O. 56 rr. 1(1), 2(2), O. 92 r. 4

For the plaintiffs - Kadir Kassim; M/s. C.S. Saini & Associates

For the defendants - Wong Kim Fatt (L. Nagarajan with him); Gulam & Wong

JUDGMENT

Anuar bin Dato' Zainal Abidin J:

The plaintiffs, being dissatisfied with my decision given after further argument in open Court confirming my earlier decision made in chambers, Encl. (32), to extend time to enable the 2nd and 3rd defendants to apply for further argument, have appealed to the Supreme Court. I now give my reasons for granting the extension of time.

The principal issue in these proceedings is whether I should exercise my discretion in favour of extending time to enable the 2nd and 3rd defendants to apply for further argument

under the provisions of O. 56 r. 2 (2) of the Rules of the High Court 1980 ("the RHC") reading as follows:

> 0rder 56 r. 2(2). Any party dissatisfied with any order made by a Judge in Chambers may apply, at the time the order is made, orally or at any time within four days from the day of order in writing to the Registrar, for the adjournment of the matter into Court for further argument, and on such application, the Judge may either adjourn the matter into Court and hear further argument, or may certify in writing that he requires no further argument. If the Judge hears further argument, he may set aside the order previously made and make such other order he thinks fit.

On 23 July 1992, I made an order in chambers allowing the plaintiff's appeal to Judge in Chambers under O. 56 r. 1(1) of the RHC deciding in favour of the plaintiffs entering summary judgment against the defendants, thus reversing the decision of the Senior Assistant Registrar who had dismissed the plaintiffs' Order 14 application. All the three defendants had not applied orally at the time the order was made or thereafter in writing within the four-day period for further argument in open Court. As the four-day period had expired, the 2nd and 3rd defendants subsequently applied by summons-in-chambers dated 22 October 1992 (Encl. (32)) for an order (a) to extend time under O. 3 r. 5(1) of the RHC to enable them to apply for further argument under O. 56 r. 2 (2) of the RHC in respect of my order made in chambers on 23 July 1992, and (b) for stay of execution of my said order of 23 July 1992. We are not concerned with the 1st defendant company as it had not taken any steps to appeal.

The 2nd and 3rd defendants' said application, supported by the affidavit of the 2nd defendant, was fixed for hearing before me in chambers on 30 October 1992 at 9 a.m.. The plaintiffs did not file any affidavit in reply. When the case was called up for hearing at 9.05 a.m. that morning, Counsel for the 2nd and 3rd defendants was present before me in chambers, while Counsel for the plaintiff was absent without informing the Court. I was informed by Counsel for the 2nd and 3rd defendants that a copy of the summons-in-chambers and a copy of the supporting affidavit had been served on the solicitors for the plaintiffs who were also aware of the date of hearing. Accordingly, I proceeded to hear the application on its merits in the absence of Counsel for the plaintiffs and, in the exercise of my discretion and in the interests of justice, granted an order extending four days for the 2nd and 3rd Defendants to apply for further argument (which was duly done) and staying execution of my order of 23 July 1992. Being dissatisfied with my order of 30 October 1992 given in chambers, the solicitors for the plaintiffs applied within the four-day period for further argument and I allowed their application. The absence of Counsel for the plaintiffs on 30 October 1992 therefore had not deprived them of the opportunity of presenting their case against the application for extension of time

After my order of 30 October 1992 and before the hearing of further argument on 20 April 1993, the plaintiffs filed an affidavit in reply affirmed on 16 April 1993. At the hearing of further argument in open Court on 20 April 1993, learned Counsel for the plaintiffs, Encik Kadir Kassim, informed the Court that he was not using the affidavit. I would state in passing that further argument under O. 56 r. 2 (2) does not mean the reception of further affidavit evidence without leave of Court.

Learned Counsel for the plaintiffs submitted that the 2nd and 3rd defendants applied for extension of time after a delay of over two months after the order of 23 July 1992 was given. He argued that there was no affidavit from the solicitor concerned as to the efforts made to trace the defendants. The gist of his contention is that, in the circumstances of the case, I should not exercise my discretion to extend time.

On the other hand, it was contended by Encik Wong Kim Fatt, learned Counsel for the 2nd and 3rd defendants, that under O. 3 r. 5 (1) the Court has express jurisdiction to extend time, and that under O. 92 r. 4, it has inherent jurisdiction to do so to prevent injustice. He further contended that there was a presumption that I had exercised my discretion correctly and that the plaintiffs had failed to show that I had exercised my discretion on wrong principles.

Order 3 Rule 5(1) reads as follows:

> The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorized by these rules or by any judgment, order or direction, to do any act in any proceedings.

To my mind, it is clear that r. 5 (1) confers on the Court a wide discretion in either extending

time, or in special circumstances abridging time to do any act required or authorized by the RHC. The scope of r. 5(1) is rather wide and is not intended to restrict the discretion of the Court, but rather to confer on the Court an unfettered discretion which should be exercised judicially, not arbitrarily or capriciously, based on the facts of each particular case, having regard to a number of material factors such as the reasons for the delay, the length of delay, the merits of the claim or the defence as the case may be, and the degree of prejudice to the other party. The general principles applicable can be seen in a number of leading cases.

In the often-quoted English Court of Appeal case of *Palata Investments Ltd. v. Burt & Sinfield Ltd.*[1985] 2 All ER 517 in which the appellants were three days out of time, Ackner LJ, in affirming the decision of Neill LJ extending time to give notice of appeal, said at page 521:

> ... in cases where the delay was very short and there was an acceptable excuse for the delay, as a general rule the appellant should not be deprived of his right of appeal and so no question of the merits of the appeal will arise. We wish to emphasise that the discretion which fell to be exercised is unfettered, and should be exercised flexibily with regard to the facts of the particular case. No doubt in some cases it may be material to have regard to the merits of the appeal, because it may be wrong, and indeed may be an unkindness to the appeallant himself, to extend his time for appealing after he has allowed the time to elapse, to enable him to pursue a hopeless appeal.

In *Sinnathamby v. Lee Chooi Ying* [1987] 1 MLJ 110 where the appellants were four days out of time, the Supreme Court considered the circumstances under which the Court would exercise its power in granting an appellant extension of time to file notice of appeal. Mohamed Azmi SCJ said at page 112:

> In exercising its discretion, the court would *inter alia* consider the reason for the delay, the length of the delay and the likelihood of prejudice to the successful party in the court below.

In the more recent Singapore case of *Pearson v. Chen Chien Wen Edwin* [1991] 3 MLJ 208 the Court of Appeal, however, refused an application for an extension of time to appeal against a Court order on ancillary matters owing to a misreading of the Rules of the Supreme Court by the applicant's solicitors as the applicant had failed to show grounds sufficient to persuade the Court to show sympathy to her.

I now come to consider the supporting affidavit affirmed by the 2nd defendant. He stated *inter alia* that he was not aware of the order of 23 July 1992 because he was out of town on business and could not be contacted. He first knew of that order when the solicitors for the plaintiffs served the order on him by letter dated 13 October 1992. He contacted his solicitors and was informed that the time for the application for further argument had expired as he could not be contacted for instructions. He immediately took steps, within a matter of a few days, to apply to Court for extension of time, supported by his affidavit of 18 October 1992. He further deposed that he had merits in his case and that from the point of fact and law the 2nd and 3rd defendants, as directors and shareholders of the 1st defendant company which entered into the relevant agreement dated 3 November 1986 with the 1st to the 10th plaintiffs to purchase their respective individual shares in a company by the name of Seri Naga Construction Sdn. Bhd., were not liable to the plaintiffs. I have also considered the pleadings. The fourteen plaintiffs claimed against the three defendants the sum of RM850,000 with interest due under the said agreement. They also claimed in two alternatives specific performance and damages. The 2nd and 3rd defendants pleaded that the forfeiture of the 1st defendants' 10% deposit by the plaintiffs had satisfied the plaintiffs' claim based on a certain provision of the agreement.

While I make no (and ought not to make any) decision on the merits of the claim at this stage of the proceedings, I consider the defence to be one of the factors to be taken into account in whether to extend time. In the circumstances, I accept the reasons for the delay. I am of the opinion that there are sufficient materials before me and I confirm my decision of 30 October 1992 in exercising my discretion in extending the time in the interests of justice. The 2nd and 3rd defendants should not be deprived of the opportunity for further argument in the circumstances of the case. To my mind, the plaintiffs would not be prejudiced by the extension of time, as in any event they still have the full opportunity to prove their claim at the trial even if they fail to obtain summary judgment.